

United States
Court of Appeals
for the Ninth Circuit

THE COMMANDER DOOR, INC., a corporation,
Appellant,
vs.

DUNSMUIR LUMBER CO., a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Northern Division

FILED
NOV 14 1951

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	6
Appeal:	
Certificate of Clerk to Transcript of Record	
on	21
Designation of Record on	17
Notice of	17
Order Extending Time to Designate Record	
on	18
Order Extending Time to Docket Record on..	19
Statement of Points to be Relied Upon on....	88
Certificate of Clerk to Transcript of Record on	
Appeal	21
Complaint	3
Designation of Record on Appeal.....	17
Judgment	14
Minute Order of April 23, 1951.....	13
Motion for Dismissal	61
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	17

	PAGE
Order Extending Time to Designate Record on Appeal	18
Order Extending Time to Docket Record on Appeal	19
Statement of Points to be Relied Upon on Appeal	88
Transcript of Proceedings.....	22
Exhibits (for Identification):	
1—Contract dated March 3, 1950, The Commander Door, Inc., and Dunsmuir Lumber Company	24
5—Letter written in longhand addressed to “Dear Ed” and signed Ted Bennett, stamped received Oct. 9, 1950.....	51-53
6—Letter dated Oct. 26, 1950, Philip Dorfman to Dunsmuir Lumber Co.....	55
8—Letter dated Sept. 30, 1949, T. D. Bennett to Ed Howell	66
9—Letter from T. D. Bennett to Edward N. Howell, dated Feb. 10, 1950.....	69
10—Letter from T. D. Bennett to Edward N. Howell, dated Feb. 23, 1950.....	71
11—Copy of Letter from Commander Door, Inc., to T. D. Bennett, dated July 25, 1950.	74
12—Original Contract dated Feb. 17, 1950, submitted to Mr. Rygel	76

Transcript of Proceedings—(Cont'd)

Exhibits (for Identification)—(Cont'd)

13—Letter from Dunsmuir Lumber Co. to Com- mander Door, Inc., dated Feb. 20, 1950	81
14—Letter from T. D. Bennett to Edward N. Howell, dated July 27, 1950	84
Motion to Dismiss	61
Witness:	
Howell, Edward N., Sr.	
—direct	29
—cross	37
—redirect	48
—recross	58

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

**GLADSTEIN, ANDERSEN & LEONARD,
GEORGE R. ANDERSEN,
240 Montgomery Street,
San Francisco 4, California.**

For Appellee:

**CARLTON & SHADWELL,
DANIEL S. CARLTON,
Carter Building,
Redding, California.**

In the United States District Court for the Northern
District of California, Northern Division

No. 6410

THE COMMANDER DOOR, INC., a corporation,
Plaintiff,
vs.

DUNSMUIR LUMBER CO., a corporation,
Defendant.

COMPLAINT FOR MONEY

Plaintiff complains of defendant and for cause of
action alleges:

I.

That plaintiff, The Commander Door, Inc., is a
corporation organized and existing under and by
virtue of the laws of the State of Illinois and that
its principal place of business is in the City of
Chicago, State of Illinois.

II.

That defendant, Dunsmuir Lumber Co., is a cor-
poration organized and existing under and by virtue
of the laws of the State of California and that its
principal place of business is in the State of Cali-
fornia.

III.

That on or about March 3, 1950, plaintiff ordered,
in writing, a quantity of lumber from said defendant,
and that said order was placed on plaintiff's
Order Form No. 2122.

IV.

That said order consisted by way of general description of certain lumber for the manufacture of doors.

IV.

That after said order was delivered to and accepted by said defendant, said defendant entered upon the performance of said order and pursuant to the acceptance thereof, shipped and delivered to plaintiff a certain portion of said order, to-wit, lumber for the manufacture of doors.

V.

That all of said lumber as aforesaid delivered to plaintiff has been accepted by plaintiff and paid for by it.

VI.

That under the terms of said order, so accepted by defendant as aforesaid, there is a balance of lumber remaining to be shipped on said order totaling the equivalent of 5,350 doors.

VII.

That said defendant, contrary to the terms of said order and the agreement of the parties, has failed and refused, and presently fails and refuses, to fulfill the balance of said order although demand has been made upon the said defendant that it do complete the balance of said contract.

VIII.

That due to the present conditions of the lumber market and the difficulty of purchasing comparable lumber in the open market, plaintiff has been un-

able to purchase other or additional lumber within a time reasonably sufficient to enable it to receive delivery thereof, process said lumber into doors, and comply with orders and markets presently available to plaintiff.

IX.

That said plaintiff earns and makes a reasonable net profit to it of \$4.00 for each door processed and sold from the lumber referred to in the order so accepted by defendant as aforesaid.

X.

That by virtue of the foregoing, and the failure and refusal of defendant to comply with said agreement, plaintiff has been rendered unable to make, process and sell the said doors and has lost profits from said sales in the said sum of \$4.00 per door, or the total sum of \$21,400.

XI.

That by virtue of the foregoing, plaintiff has sustained damage in the sum of \$21,400.

Wherefore, plaintiff prays judgment, etc.

As and for a Second Cause of Action, plaintiff alleges:

I.

Incorporates herein by reference as though fully set forth at this point, the allegations contained in Paragraphs I and II of the first cause of action herein.

II.

That said defendant has received for the use and benefit of plaintiff the sum of \$362.21.

III.

That although demand has been made upon said defendant that defendant pay the said sum, the entire said sum is presently due, owing and payable from the said defendant to plaintiff.

Wherefore, plaintiff prays judgment in the sum of \$21,762.21, for costs of suit herein, and for such other and further relief as may be deemed just in the premises.

GLADSTEIN, ANDERSEN &
LEONARD,
/s/ By GEORGE R. ANDERSEN,
. Attorneys for Plaintiff.

Affidavit of Verification attached.

[Endorsed]: Filed Nov. 6, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the above named defendant and answering unto plaintiff's complaint and to each and every cause of action therein stated, denies and alleges as follows, to-wit:

Answer to First Cause of Action**I.**

Answering unto Paragraph I of said first cause of action, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the statements therein, and placing its denial on this ground, denies each and every, all and singular, the allegations therein contained.

II.

Answering unto Paragraph II of said first cause of action as to the allegations therein contained commencing with the word "organized" on page 1, line 24, thereof, and continuing to the word "California" on page 1, line 31 thereof, said defendant denies each and every, all and singular, the allegations therein contained.

III.

Answering unto Paragraph VI of said first cause of action, said defendant denies that the balance of lumber remaining to be shipped under the order therein mentioned is the equivalent of 5,350 doors or any part or portion of said amount in excess of 2,800 partial doors; defendant further alleges that by reason of the facts and circumstances herein-after set forth the defendant's obligation to ship any lumber whatever to plaintiff has been terminated.

IV.

Answering unto Paragraph VII of said first cause

of action, said defendant denies each and every, all and singular, the allegations therein contained.

V.

Answering unto Paragraph VIII of said first cause of action, said defendant denies each and every, all and singular, the allegations therein contained.

VI.

Answering unto Paragraph IX of said first cause of action, said defendant alleges it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, and placing its denial on that ground, said defendant denies each and every, all and singular, the allegations therein contained and denies that said plaintiff makes a reasonable net profit of \$4.00 on each door therein mentioned or any part or portion of said sum.

VII.

Answering unto Paragraph X of said first cause of action, said defendant denies each and every, all and singular, the allegations therein contained; further answering unto said Paragraph X said defendant denies that plaintiff lost profits in the sum of \$21,400 or any part or portion of said sum.

VIII.

Answering unto Paragraph XI of said first cause of action, said defendant denies each and every, all and singular, the allegations therein contained; further answering unto said Paragraph XI said defendant denies that said plaintiff has sustained

damage in the sum of \$21,400 or any part or portion of said sum.

As and for a Further, Separate and First Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That the contract mentioned in plaintiff's complaint provided that payment for all lumber shipped thereunder would be delivered to defendant at its place of business by the plaintiff within ten days after date of invoice for said lumber; that consistently and habitually during the course of said contract plaintiff has failed, neglected and refused to make the payments for the lumber shipped to it within the said specified time; that defendant has on various occasions requested of said plaintiff that it meet its payments regularly; that notwithstanding such requests, plaintiff has continued to fail to make payments in accordance with said contract; that by reason of the premises, defendant has notified said plaintiff that it would not ship it further lumber unless it guarantee the making of payments in accordance with said contract through the medium of a letter of credit.

As a Further, Separate and Second Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That it does not have available presently lumber to fill said order and it has so advised the plaintiff; that the agreement of the parties hereto was sub-

ject to lumber shortages and the parties agreed that the defendant should be excused from performance if lumber was unavailable to it; that the defendant has heretofore advised plaintiff of the unavailability of lumber to it to fill said order; that lumber to comply with said order is available to said plaintiff and defendant has requested of plaintiff that it cause such lumber to be shipped to defendant's mill and that it would manufacture the same for plaintiff's benefit at cost; that said plaintiff has failed, neglected and refused to comply with such request and still fails, refuses and neglects to comply with such request.

As a Further, Separate and Third Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That the agreement of the parties hereto for the shipment of said lumber provides as follows, to-wit: "That any unshipped portion of this contract may be cancelled at any time without cost to us"; that by reason of the premises, defendant had the right to cancel said contract as to any unshipped lumber without liability or responsibility.

As a Further, Separate and Fourth Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That during the times mentioned in plaintiff's first cause of action lumber conforming to the terms of the contract therein mentioned was available to

it on the open market and at prices comparable to said contract prices; that said plaintiff could have purchased said lumber and thus obtained the lumber needed by it without damage to itself; that plaintiff has failed and refused to purchase such lumber so as to eliminate its claimed damages.

As and for a Further, Separate and Fifth Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That at the time of the making of the contract therein mentioned, and as a condition precedent thereto, plaintiff and defendant agreed that the prices for lumber specified in said contract would be firm except that the same would be increased if labor costs increased; that a labor increase occurred on or about May, 1950, and plaintiff consented to an appropriate increase of prices in said lumber; that a subsequent labor increase occurred on or about September, 1950, and defendant demanded that plaintiff consent to a corresponding increase in said lumber costs; that said plaintiff refused to consent to an increase in lumber costs proportionate to said labor cost increase, and refused to consent to any increase whatever in the costs of said lumber; that by reason of the previous defendant has been relieved from performing said contract.

As a Further, Separate and Sixth Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That it has always advised plaintiff that it would comply with the terms of said contract and supply the lumber therein mentioned when lumber was available to defendant and if plaintiff would pay the agreed prices for said lumber and make payments in accordance with the terms of said contract.

Answer to Second Cause of Action

I.

Answering unto Paragraphs II and III of said second cause of action, said defendant denies each and every, all and singular, the allegations contained in each of said paragraphs; further answering unto said second cause of action, said defendant denies that it has received any sum of money whatever for the use and benefit of plaintiff and denies that it owes the plaintiff the sum of \$362.21 or any part or portion of said sum.

Wherefore, said defendant prays judgment against said plaintiff as follows, to-wit:

1. That said plaintiff take nothing by its complaint or either of the causes of action therein stated.
2. That defendant be awarded its costs of suit incurred herein together with such other and further relief as may seem meet and proper to the court.

CARLTON & SHADWELL,
/s/ By DANIEL S. CARLTON,
Attorneys for Defendant.

Affidavit of Verification attached.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 24, 1950.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 23rd day of April, in the year of our Lord one thousand nine hundred and 1951.

Present:

The Honorable Dal M. Lemmon, District Judge.

[Title of Cause.]

MINUTE ORDER

This being the time heretofore set for the trial of this case without a jury, George R. Anderson, Esq., appearing for the plaintiff; and Daniel S. Carlton, Esq., for the defendant. After hearing counsel, it is Ordered that the complaint be amended to make the defendant corporation a Nevada Corporation instead of a California Corporation; Further that the second defense is here is not valid. On the first cause of action, Edward N. Howell, Sr., and R. A. Howell are sworn and testify for plaintiff. Plaintiff's exhibits 1 to 6 are marked and admitted. Plaintiff rests. Mr. Carlton on behalf of defendant moves for dismissal of the first cause of action. Plaintiff is allowed to present proof in opposition to said motion. Plaintiff's exhibits 7 to 14 are marked for identification. Objection to strike such proof by Mr. Carlton is granted and the first cause of action is Ordered Dismissed. Counsel stipulate that the sum of \$362.21 is correct as to freight charges sought to be recovered. Ordered that plaintiff have judgment

as to his second cause of action in the sum of \$362.21. Judgment and order to be submitted thereon. Findings of fact and conclusions of law are waived by both sides.

In the United States District Court for the Northern District of California, Northern Division

No. 6410

THE COMMANDER DOOR, INC., a corporation,
Plaintiff,

vs.

DUNSMUIR LUMBER CO., a corporation,
Defendant.

JUDGMENT

The above entitled action came on regularly for trial on April 23, 1951, before the above entitled court sitting without a jury, Messrs. Gladstein, Andersen & Leonard appearing as attorneys for plaintiff and Messrs. Carlton and Shadwell appearing as attorneys for defendant, and evidence, both oral and documentary, having been introduced on behalf of the plaintiff on its two causes of action set forth in its complaint herein, and said plaintiff having closed its case, and said defendant, by its counsel, having moved the above entitled court for an order of dismissal of the action and claim set forth in the first cause of action of plaintiff's complaint herein on the grounds that upon the facts and the law the plaintiff has shown no right to relief and upon the ground that upon said trial the plaintiff had proved that

the defendant had the unqualified right to cancel the contract on which said first cause of action was based at the time said defendant did cancel said contract, and without liability on its part, and said motion was made pursuant to Rule 412 of the Federal Rules of Civil Procedure, and said motion having been duly considered by the court and court having granted said motion as to said first cause of action in plaintiff's complaint herein.

And plaintiff having offered evidence in support of its second cause of action in its complaint and the parties having stipulated in open court that findings of fact and conclusions of law be expressly waived and the court being fully advised,

It Is Hereby Ordered, Adjudged and Decreed, as follows, to-wit:

1. That a judgment of dismissal be and the same is hereby entered in favor of the defendant Dunsmuir Lumber Co., a corporation, and against the plaintiff The Commander Door, Inc., a corporation, in said action as to the purported cause of action set forth in the first cause of action in the complaint in the above entitled action and wherein the plaintiff seeks judgment against the said defendant in the sum of \$21,400.00 upon the grounds that upon the said trial the plaintiff failed to prove a sufficient case before the court, and on the grounds that upon the facts and the law the plaintiff has shown no right to relief on said first cause of action, and upon the grounds that under the evidence submitted by the plaintiff herein, the defendant had the unquali-

fied right to cancel and terminate the contract that is the subject of the first cause of action herein at the time it did so, and without liability on its part.

2. That the above named plaintiff take nothing by its claim set forth in its first cause of action as against the above named defendant and that said defendant do have and recover judgment against said plaintiff on the claim set forth in said first cause of action.

3. That the plaintiff The Commander Door, Inc., a corporation, do have and recover judgment against the defendant Dunsmuir Lumber Co., a corporation, on the second cause of action set forth in the complaint herein, in the sum of \$362.21.

4. It is further ordered, adjudged and decreed that each party shall bear his own costs.

Dated: This 2nd day of May, 1951.

/s/ DAL M. LEMMON,
Judge.

Entered: May 2, 1951.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 2, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court:

Please Take Notice that the plaintiff in the above-entitled cause hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment heretofore made and entered herein on May 2, 1951 on the first cause of action in the complaint on file herein.

Dated: May 28, 1951.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By GEORGE R. ANDERSEN,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 29, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

You Are Hereby Notified that the plaintiff-appellant in the above-entitled matter hereby designates as its record on appeal the entire Clerk's record, including all of the pleadings, findings of fact and conclusions of law, and judgment, said judgment having been entered on May 2, 1951; the entire re-

porter's transcript, including all of the exhibits (save and except the large financial statement in folder form), including all exhibits offered and received in evidence and offered and marked for identification in the trial of the above matter; all of the testimony of all of the witnesses sworn, together with all offers of proof made by plaintiff.

Dated: May 28, 1951.

GLADSTEIN, ANDERSEN &
LEONARD,
/s/ By GEORGE R. ANDERSEN,
Attorneys for Plaintiff-Appellant

[Endorsed]: Filed May 29, 1951.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor, It Is Hereby Ordered that appellant above-named may have to and including the 9th day of August, 1951, within which to designate the record on appeal in the above-entitled cause.

Dated: This 12th day of July, 1951.

/s/ DAL M. LEMMON,
U. S. District Judge.

[Endorsed]: Filed July 12, 1951.

[Title of District Court and Cause.]

**ORDER EXTENDING TIME TO DOCKET
AND PERFECT APPEAL**

Good cause appearing to me therefor, it is hereby Ordered that the time within which to docket the appeal herein is extended to and including August 24, 1951.

Dated: August 3, 1951.

/s/ DAL M. LEMMON,
United States District Judge.

**AFFIDAVIT IN SUPPORT OF MOTION EX-
TENDING TIME TO DOCKET APPEAL**

State of California,
City and County of San Francisco—ss.

George R. Andersen, being first duly sworn, deposes and says: That he is counsel for plaintiff and appellant herein. That the appeal herein was filed with the Clerk of the above-entitled Court at Sacramento on May 29, 1951. That the transcript of testimony of the record on appeal has not as yet been completed.

That pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, the United States District Court may extend the period of time to docket or perfect an appeal for a period of ninety days from the date of the filing of the Notice of Appeal, to-wit: May 29, 1951.

That this morning affiant talked on the telephone

with the official reporter of the above-entitled Court, who advised counsel that the transcript was not as yet ready, had not been transcribed, and that he needed additional time to do it, and after discussion said reporter thought that the work could be done and the transcript filed within another fifteen to twenty days.

That as a result of the reporter's inability, due to press of other work, to file the record as hereinabove mentioned, affiant requests that the time to file the record on appeal be extended to and including August 24, 1951.

/s/ GEORGE R. ANDERSEN

Subscribed and sworn to before me this 3rd day of August, 1951.

[Seal] /s/ AGNES QUAVE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Jan. 14, 1953.

[Endorsed]: Filed Aug. 3, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal as designated by the parties.

Complaint.

Answer.

Minute Order of April 23, 1951.

Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Order Extending Time to Docket Appeal.

Order Extending Time to Docket Appeal.

Reporter's Transcript.

Plaintiff's exhibits 1 to 6 incl., and 8 to 14 incl.

In Witness Whereof, I have hereunto set my hand and the Seal of said Court this 22nd day of August, 1951.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ By C. C. EVENSEN,
Deputy Clerk.

In the District Court of the United States for the
Northern Division of California, Northern District

No. 6410

THE COMMANDER DOOR, INC., a corporation,
Plaintiff,

vs.

DUNSMUIR LUMBER CO., a corporation,
Defendant.

Before: Hon. Dal M. Lemmon, Judge.

REPORTER'S TRANSCRIPT

Monday, April 29, 1951

Appearances:

For the Plaintiff: George R. Andersen, Esq.

For the Defendant: Daniel S. Carlton, Esq. [1*]

The Clerk: Civil Number 6410, Commander Door,
Inc., vs. Dunsmuir Lumber Company, for trial.

The Court: Both sides ready?

Mr. Andersen: Yes, your Honor.

The Court: I wonder if counsel might call for stipulations or make any admissions to simplify these issues?

Mr. Andersen: I represent the plaintiff, may it please the Court. Has your Honor read the pleadings?

The Court: Yes. I understand them.

Mr. Andersen: The issues are very simple. Our

* Page numbering appearing at top of page of original certified Reporter's Transcript.

cause of action is based upon a contract dated March 3rd, a copy of which I am sure counsel for the defendant has (exhibiting to counsel).

Mr. Carlton: Well, I think that is the contract, your Honor.

The Court: It may be received in evidence. Offer it in evidence, Mr. Andersen?

Mr. Carlton: Yes.

Mr. Andersen: Yes, as Plaintiff's 1, may it please the Court.

(The document referred to was marked Plaintiff's Exhibit Number 1.)

No. 6410
Exhibit No. 1
APR 23 1951

C. W. Calbreath, Clerk
W. E. Jenkins
Deputy Clerk

PURCHASE ORDER

THE COMMANDER DOOR, INC.

PENNSYLVANIA

LOMBARD, ILLINOIS

PORTLAND, OREGON

EDWARD N. HOWELL, PRES.

DATE March 3, 1950

NO. 2122

PAGE 1 of 2

TO DUNSMUIR LUMBER COMPANY
DUNSMUIR, CALIFORNIA

THIS NUMBER MUST APPEAR
ON ALL INVOICES, PACKAGES
& SHIPPING INSTRUCTIONS

HOLMES, PA.

PLEASE SHIP THE FOLLOWING:

ATTENTION: MR. DON RYGEL

ITEM	ARTICLE	UNIT PRICE	EXTENSION
/L	Cut stock "A" each car consisting of the following		
	750 pcs. 4-7/8" x 8'-0" 750 " 3 1/2" x 8'-0" 4500 " 2 1/2" x 8'-0" 12000 " 2 1/2" x 19 1/4" 9000 " 3 1/2" x 19 1/4"	\$9.06 per set delivered our plant, Holmes, Pennsylvania	
/L	Cut stock "B" each car consisting of the following		
	800 pcs. 4-7/8" x 8'-0" 800 " 3 1/2" x 8'-0" 3200 " 2 1/2" x 8'-0" 7200 " 3 1/2" x 25 1/2" 4800 " 2 1/2" x 25 1/2"	\$7.00 per set delivered our plant, Holmes, Pennsylvania	

The above materials are to be old growth Douglas Fir KD to 0-12% moisture content, with 40% minimum vertical grain all B & Better grade, clear, no pitch pockets, knots, etc. Dressed two sides to 1-13/32" Thickness.

The 96" lengths are to be exact precision cut square ends; 19 1/4" and 25 1/2" lengths may be full to 1/4" but not less than 19 1/4" and 25 1/2". All pieces to be double tied in bundles that can be handled by one man.

7.30 M

The Commander Door

REG. TRADE MARK

The Blue Copy must be signed and returned to us within 10 days giving definite shipping date.

THE COMMANDER DOOR, INC.

Per R. A. Howell

Director of Purchases

Accepted by W. E. Jenkins

Ship to Holmes, Pa. L.C.L., Motor Freight; Carload, B. & O.



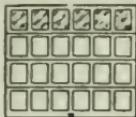
PURCHASE ORDER

THE COMMANDER DOOR, INC.

HOLMES, PENNSYLVANIA

LOMBARD, ILLINOIS

PORTLAND, OREGON



EDWARD N. HOWELL, PRES.

DATE March 3, 1950

N^o 2123

PAGE 2 of 2

THIS NUMBER MUST APPEAR
ON ALL INVOICES, PACKAGES
& SHIPPING INSTRUCTIONS

HOLMES, PA.

TO DUNSMUIR LUMBER COMPANY
DUNSMUIR, CALIFORNIA

PLEASE SHIP THE FOLLOWING:

ATTENTION: MR. DON RYGEL

QUANTITY	ARTICLE	UNIT PRICE	EXTENSE
TERMS:			
	3% discount ten days after date of invoice, less freight		
	The prices on this order are firm.		
	Quantity of cars can be decreased or increased as we required in cooperation with the manufacturer.		
SHIPPING SCHEDULE			
	"A" DOORS	"B" DOORS	
April 1, 1950	November 1	March 15	
May 1	November 15	April 1	
May 15	December 1	June 15	
June 1		August 15	
June 15		October 15	
July 1		November 15	
July 15			
August 1			
August 15			
September 1			
September 15			
October 1			
October 15			
	ROUTING: SP UP CRI & P B & O CT. B & O		

It is understood and agreed that any unshipped portion of this contract may be cancelled at any time, without cost to us.

"The Commander Door"
REG. TRADE MARK

The Blue Copy must be signed and returned to us within 10 days giving definite shipping date.

THE COMMANDER DOOR, INC.

Accepted by E. A. HowellPer E. A. Howell

Director of Purchases

Ship to Holmes, Pa. L.C.L., Motor Freight; Carload, B. & O.

The Court: What is the contention here, that this [2] contract is partially in writing and partially verbal?

Mr. Andersen: No; as I understand the issue from the plaintiff's standpoint, it is simply this, your Honor: my client, the Commander Door Company back east ordered certain cut lumber from the defendant under an order which is now Plaintiff's Exhibit Number 1. The order was accepted by the defendants.

The Court: Your position is that the contract is complete in and of itself?

Mr. Andersen: Complete in and of itself.

Under the contract, they shipped roughly twenty carloads of lumber and did not ship the balance. The balance would make up roughly five thousand doors, and the profit on the doors which my client lost would be approximately \$4.00 a door.

I think they will admit they did not ship the lumber; I don't think there is any question about that.

The Court: I think the pleadings disclose that.

Mr. Andersen: Yes. That is our case, your Honor. The only matter of proof and evidence as far as the plaintiff is concerned is a little cost accounting so far as the profits on the business are concerned. I think that is our case, if you want to put it through in a hurry.

The Court: I will hear from Mr. Carlton.

Mr. Carlton: The issues from the point of view of the defendant would be three primarily, your Honor: Number 1, [3] there is a proposition that payments

were not made in accordance with the stipulated time of the contract, there was a breach.

The Court: It was not rescinded?

Mr. Carlton: Yes, the contract was ultimately rescinded.

The Court: Prior to the bringing of this suit?

Mr. Carlton: Yes; on another ground. That is, it is alleged that the contract was cancelled—

The Court: Now, as long as you brought that subject up, I notice in your second defense you make that allegation, and it strikes me that this would amount to a variance by the defendant of the terms of the contract.

Mr. Carlton: You mean on the payment matter, your Honor?

The Court: You alleged the terms of the contract were that the payment would be made within ten days after date of invoice, and then you notify the plaintiff that you won't ship any more unless they make some arrangements to make payments promptly. Now you are attempting to vary the terms of that contract by your own allegation.

Mr. Carlton: No, there were subsequent negotiations that went along.

The most material things, your Honor, are two: Number 1, that the contract on its face states in two places that it is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us.

The Court: You have that in another defense, Mr. Carlton. [4]

Mr. Carlton: That is right.

The Court: But I am referring to this particular defense, this second defense.

Mr. Carlton: Well, the payment program is in the background. Although we are not relying on that particularly, we are not abandoning it—

The Court: It struck me that your second alleged defense is not—

Mr. Carlton: —but the defense we insist on very seriously is that the contract provides twice on its face that "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us."

The Court: And you claim it was cancelled prior to the bringing of this suit?

Mr. Carlton: That is correct, and that is alleged in the complaint it was cancelled, and in our position that, I think, applies to both parties, that if it applies to one party it makes no difference, it can be cancelled by the other, under the California authorities. [5]

* * * * *

EDWARD N. HOWELL, SR.,
recalled for the plaintiff, previously sworn.

Direct Examination

Mr. Andersen: Q. Mr. Howell, with respect to this order dated March 3rd, with which you are familiar, how long has your company been engaged in this particular business?

- A. Since early 1945, this particular company.
- Q. That is right after you came out of the service?
- A. That is right after I came out of the service.

(Testimony of Edward N. Howell, Sr.)

Q. And last year what was your gross value of business?

A. 1950 was over a million.

Q. Over a million dollars. And how was it in 1949, approximately?

A. Oh, it was very close to a million.

Q. Very close to a million. Has it been increasing year by year? A. That is right. [15]

Q. Now originally you placed this order with this company about a month before March 3rd, on or about February 17th, is that correct?

A. In February, yes.

Q. And in planning the manufacture of doors there, you set up your manufacturing process according to shipments as received by you, is that correct?

A. Would you repeat that?

Mr. Andersen: Would you read the question, Mr. Reporter?

(Question read.)

A. That is right.

Q. Now on plaintiff's exhibit number 3, on the second page you set forth a shipping schedule, is that correct? A. That is correct.

The Clerk: That is 1.

Mr. Andersen: I am sorry, exhibit 1.

A. That is right, the shipment schedule is exactly as we required them.

Q. And was it necessary for your plant operation to have these shipments arrive approximately as scheduled? A. Yes, it was.

(Testimony of Edward N. Howell, Sr.)

Q. Now sometime before March the defendant company refused to ship further, is that correct?

A. Before March? September.

Q. Pardon me, I am wrong on the date there, sometime about a [16] month before the lawsuit was filed?

A. Well, for the last three or four shipments according to that schedule we called and asked them, or wired them for shipping dates; we just had to take up each shipment along toward the last with them.

Q. And then at a point they wanted an increase in price, did they? A. Yes, they did.

Q. In other words, you had a conversation with the defendants where they wanted to increase the price about ten or fifteen per cent?

A. There was a seven per cent increase we acquiesed in, in order to keep the merchandise coming to us. There is one thing you have to remember, this is not ordinary lumber, crude lumber, this is processed lumber.

Q. Yes, that has already been brought to the attention of the court. Then at a later point they wanted you to post a letter of credit, did they?

A. Yes. We had a letter from their representative to that effect.

Q. Then they refused to ship completely, did they? A. Yes.

Q. Then thereafter did you have a telephone conversation with Mr. Rygel?

A. We didn't get the car that was supposed to be shipped [17] either the last of September or the first

(Testimony of Edward N. Howell, Sr.)
of October. We called them and asked them for it.

Q. And at that particular point did you have a conversation with them regarding the necessity of your receiving lumber according to the approximate schedule as ordered?

A. I explained to them we were committed on shipments of these doors and it was necessary we have them.

Q. Now with respect to the lumber itself, this lumber was all cut to size, was it?

A. To exact sizes. We even paid a premium to have them made to exact sizes.

Q. So when they got to your plant you simply remodeled them in door form?

A. No, we placed them in our tenon and moulding machines and made the tenons and mouldings on them. In other words, we saved ripping, cutting, and sawing, three operations. We put them right through the moulding and tenon machines, which gave us more capacity for our own machinery for other doors which we manufactured.

Q. Now in your conversation with Mr. Rygel, who is the President, I understand, of the defendant corporation, did you explain to him the necessity of obtaining this finished and cut lumber as you have just indicated?

A. Yes.

Q. And did you explain to him that this lumber that you [18] bought from him was part and parcel of the doors which you sold?

A. Yes; he knew that.

(Testimony of Edward N. Howell, Sr.)

Q. And did you explain to him it was precisely for that purpose and none other?

A. That is right.

Q. And did you explain to him that you had sales already for those doors? A. Yes, I did.

Q. And did you discuss a lawsuit with him?

A. We finally wound up, I told him the only thing I saw to do was to sue him, because I had no method to procure these doors to fill the orders which we already were committed for.

Q. Did you tell him, however, you did not want to sue him?

A. That is right, we did not want to sue anybody.

Q. You wanted the lumber?

A. That is right.

Q. And all of this lumber went into these doors, and for no other purpose? A. That is right.

Mr. Andersen: Now I will direct your Honor's attention—I don't know whether the Court noticed this or not—on Plaintiff's Exhibit Number 1 the order calls for the purchase of doors as such, may it please the Court.

Mr. Carlton: What is that? [19]

Mr. Andersen: I was just directing the matter to the attention of the Court.

Mr. Carlton: Well, I just wish you would refer to the portion you are referring to so I will be familiar with it.

Mr. Andersen: On the second page.

Now I was going to interrogate the witness, may it please the Court, regarding the availability of lum-

(Testimony of Edward N. Howell, Sr.)

ber, but I think that is more properly a matter of defense, rather than on our case in chief.

The Court: Except insofar as it relates to the question of damages.

Mr. Andersen: Well, I am of the opinion that is a matter of defense. I may be wrong, your Honor. I think in matters of this kind, I think the rule is—I could be mistaken, I have been mistaken before, that all we have to show is the order, the failure to comply with the contract, and the failure to—and damages. I don't believe it is up to us to prove the litigation, if any.

The Court: No, it is up to you to prove the damages.

Mr. Andersen: That is all. Now, with respect to the sales price of these doors and the cost of manufacture, what on the "A" door was the amount of profit made by your company?

A. Will you repeat that again?

Mr. Andersen: Will you read it, Mr. Reporter, with his Honor's permission? [20]

The Court: Mr. Andersen, as I understood this witness, he said that he told the President of the defendant corporation that there was no way of getting the parts that went into the doors.

Mr. Andersen: Yes, your Honor.

The Court: Now that is no proof that he could not do it, it is proof of a statement made by the President of the corporation.

(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: That is correct. I will clear that up.

(Question read.)

Mr. Carlton: I object to the question, no foundation laid, incompetent, irrelevant, and immaterial, and not the proper element of damages.

The Court: I am sustaining it for the same reason given before.

Mr. Andersen: To clear up the point raised by your Honor with respect to the material that went into the door—wood, was it?

A. That is right.

Q. Now with respect to the wood that went into the door, were you able to procure that wood anywhere else? A. No, we were not.

Q. And did you try, make efforts throughout the United States? A. We did. [21]

Q. To purchase that type of wood in different places? A. We did.

Q. And with what results?

A. We could not get any.

Q. Now again with respect to the operation of your business and the sale of these doors, were you filling those doors on order?

A. Yes, we worked against orders all last year.

Q. And you were unable to fill those orders to the extent of this order, that is, Plaintiff's Exhibit Number 1?

A. That is right, we were short that many doors for the year's business that we had sold.

(Testimony of Edward N. Howell, Sr.)

Q. You were unable, then, to purchase this lumber?

A. We could not purchase the cut stock which we ordered from him.

The Court: Q. Couldn't you purchase the lumber and have it cut somewhere else?

A. No, we could not. Last year was a big run year, everybody was running to capacity. Nobody was taking orders for cut stock.

Mr. Andersen: Q. And now with respect to your plant operation, the wood that you required, did you require it to be general or miscellaneous stock, or did you require it to be cut lumber as this order shows?

A. It had to be precision cut. [22]

Q. Now with respect to the order that you have here on Page 1, all of those measurements are precise and specific, are they?

A. Well, the pieces eight feet long are precision cut, and we allowed one and a quarter inch difference on the other pieces. That is all on there.

Mr. Andersen: Now, may it please the Court, on this question of damages, I don't know whether there is a running objection has been going to this or not. It is our position we being unable to purchase the lumber, we actually purchased doors from these people, and being then unable to get lumber to make up the doors that the damages are precisely as pleaded, namely, the difference—

The Court: It is the profit you would have made—

(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: Precisely.

The Court: —had the lumber been delivered?

Mr. Andersen: Yes.

The Court: Well, it would seem to me, Mr. Carlton, if one cannot purchase in the open market, that there must be some measure of damage and recovery to the plaintiff, and it would seem to me the reasonable measure would be his loss from the breach of the contract.

Mr. Carlton: Well, it would appear from this gentleman's testimony that would be an issue of fact, your Honor. I would like the privilege of cross examining him, if counsel is through. [23]

The Court: Yes, surely.

Mr. Andersen: Well, you may cross examine, then,
Mr. Howell.

Cross Examination

Mr. Carlton: Q. Yes. Mr. Howell, as I understand it, you are the President of the plaintiff?

A. I am President of the corporation.

Q. Do you recall when you discussed this matter with Mr. Rygel in late September or early October, that he advised you that he could not get from his woods where he was having his logging done—they weren't developing fir at that particular time, that it was coming in in a heavy quantity of pine?

A. I didn't know that Mr. Rygel owned his own woods.

Q. Do you recall the conversation?

A. I recall a conversation with him that he was not cutting fir any more, he was cutting pine.

(Testimony of Edward N. Howell, Sr.)

Q. All right. Now do you recall Mr. Rygel telling you that if you wanted to acquire the fir lumber on the market that he would mill it at the mill for you at cost?

A. I don't recall him saying that.

Q. Do you recall any conversation at all where Mr. Rygel told you in substance as follows, "My logging is not developing fir now, therefore I can't fill the order. If you want to acquire the lumber stock on the market, I will mill it at my absolute cost to you?" [24]

A. I don't remember that, because I had no method of getting lumber for him.

Q. And do you recall in that conversation, Mr. Howell, that you told Mr. Rygel, "Why, you ought to be able to get that lumber. I just got five carloads within a hundred miles of you"?

A. That is right, I did say that.

Q. "And had a cheaper price than under this contract"? A. Not cheaper.

Q. Well, did you tell him that?

A. No, not my memory.

Q. And did you tell Mr. Ted Bennett of Portland—you know who I am talking about, do you not?

A. Yes, I had dealings with Mr. Bennett.

Q. And did you tell Mr. Bennett that you had just purchased five carloads of this lumber at a better price than the Dunsmuir Lumber Company price, and that you could get more?

A. I would like to explain that, sir. The difference

(Testimony of Edward N. Howell, Sr.)
in lumber and cut stuff are two different things.
When you buy lumber in the rough—

The Court: The question is did you tell him that.

Mr. Andersen: May I object to that as immaterial
for the reason this order refers precisely to cut stock
and not general lumber, may it please the Court.

The Court: I think this is within the range of
cross [25] examination. Overruled.

Mr. Andersen: All right.

Mr. Carlton: Q. Now, did you tell Mr. Bennett
over the telephone that you had just purchased five
carloads of lumber the same as under this contract
and at a more favorable price than you were getting
from Dunsmuir?

A. Not the same as under that contract, no, be-
cause we refused all that lumber, it was inferior grade
and we couldn't use it.

Q. Did you tell him you could get more?

A. No.

Q. Did Mr. Bennett—withdraw that. Didn't Mr.
Bennett tell you that he could get you—fulfill this
order for you—

Mr. Andersen: May I interrupt just a moment?
Would you identify Mr. Bennett, Counsel?

Mr. Carlton: Yes. Mr. Bennett is the lumber
broker who handled this transaction originally. He
was, and is, I believe, on the Board of Directors of the
defendant, although he has never taken any active
part in the management of it.

Mr. Andersen: And he was speaking for Duns-
muir Lumber Company during all of this time?

(Testimony of Edward N. Howell, Sr.)

Mr. Carlton: No, he was not speaking for Dunsmuir Lumber Company. He was the intermediate broker, and that was his only capacity in that deal. He is here and he will testify.

Q. Now I want to ask you if Mr. Bennett didn't tell you in [26] late September or early October when you were talking about the remainder of this shipment that the Dunsmuir Lumber Company was out of fir? A. He wrote me a letter.

Q. All right, did he tell you that the Dunsmuir Lumber Company was out of fir?

A. In the letter.

Mr. Andersen: I would like to object to that, the letter is the best evidence. We have it, if counsel wishes to produce it—wishes to use it.

Mr. Carlton: I am asking the man if he told him that, and he says, "by letter". I take it that is a sufficient answer.

Q. Now, over the telephone did Bennett tell you that he could get you either the cut stock or the lumber for cutting on the market at comparable prices under this Dunsmuir contract?

A. Definitely no.

Q. He did not. Did you tell Mr. Bennett that no, you didn't want that, that you—Dunsmuir would either produce that or you would sue them?

A. I don't remember any such conversation.

Q. You don't remember any such conversation. Now, this Plaintiff's exhibit 1 is not a sale of doors, is it, Mr. Howell? A. Which is 1?

(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: I object to that, the contract speaks for [27] itself, may it please the court.

Mr. Carlton: Well, you have been saying that it is a sale of doors.

A. That is what it says on its face.

Mr. Carlton: Q. Is there "door" in that contract, Plaintiff's Exhibit 1?

A. It says, "door parts".

Q. All right. Now, what the contract calls for, Mr. Howell, is a certain type of lumber surfaced on two sides, which means that it is simply planed in a planing mill, doesn't it?

A. Surfaced two sides.

Q. That means planing, doesn't it, is that right?

A. Yes.

Q. And then it is cut to certain dimensions; that is, width, thickness, and length. That is correct, isn't it? A. That is a manufacturing process.

Q. Well, that is what this Plaintiff's Exhibit 1 calls for as to this particular type of lumber, isn't it?

A. That is correct.

Q. All right. And then in order—what you would get back in Pennsylvania under this Plaintiff's Exhibit 1 would be a certain number of boards which would be Douglas Fir?

A. No boards at all, cut stock.

Q. All right. They were cut from boards, I take it?

A. Well, they were cut from boards, and the boards from trees. [28]

Q. Is there anything added to that?

A. Added to the boards?

(Testimony of Edward N. Howell, Sr.)

Q. Yes.

A. These were not boards, sir.

Q. What they were, what was shipped thereunder were pieces of lumber of certain widths, thicknesses, and lengths which had simply been surfaced on two sides, is that not correct?

A. That is not correct, sir, they were processed to a certain extent, to a part of a door.

Q. What processing are you referring to?

A. They were to be in dimensions so they could be put in moulding machines and tenon machines.

Q. Cut to size, cut up into thicknesses and lengths, is that it?

A. Cut to measurement for the doors.

Q. That is all dimension means, doesn't it?

Mr. Andersen: May I suggest we are getting to argument now, your Honor?

The Court: Overruled.

Mr. Carlton: Q. Now, if you were unable to get this stock from Dunsmuir, did you have any objection to getting the same quality of lumber in random lengths and then having it cut to stock?

A. You mean cut to different dimensions?

Q. That is right. [29]

A. By some other company?

Q. That is right.

A. We have had no objection to that.

Q. And that would have been a complete fulfillment of your order if you had been able to do that? You would have gotten what you wanted under this contract if you had been able to do that?

(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: I object to that as speculative and argumentative.

The Court: Sustained.

Mr. Carlton: Q. You, as a matter of fact, in your Pennsylvania plant rip, and what is the other process, saw? A. Rip and cut off.

Q. Rip and cut off in order to produce the boards to these dimensions, don't you?

A. That is right.

Q. You have a good deal of machinery devoted to that purpose, do you not?

A. A very modern mill.

Q. What is that?

A. We have a modern mill.

Q. And in that modern mill you do a great deal of ripping and sawing off to lengths in order to produce lumber to this so-called cut stock?

A. We run to capacity. [30]

Q. Well, you do that, do you not?

A. We do that.

Q. Now do I understand you to testify that you could not get in the United States lumber stock of the character involved in Plaintiff's Exhibit Number 1 in early October of 1950?

A. We exhausted every means we knew to get cut stock, and couldn't get it.

Q. Now you didn't answer the question.

Mr. Andersen: I submit it was an answer, may it please the Court.

Mr. Carlton: Q. Did you—did you testify that you could not get lumber of the quality described in

(Testimony of Edward N. Howell, Sr.)

Plaintiff's Exhibit 1 in early October of 1950?

A. We had all of our machines running in full capacity on lumber in the twenty other sizes shown on that price list, and we purchased cut stock to relieve the pressure in the cutting and ripping. In other words, we can only cut and rip so many pieces of lumber in a day, and this was in addition to everything we could do.

Q. Now would you mind answering the question? Your answer is not responsive to the question.

The Court: Read the question, Mr. Reporter, and listen to it.

(Question read.)

A. Buy lumber, that is true, yes, you could buy lumber. [31]

Mr. Carlton: Q. You could have bought this lumber?

A. We could not have bought cut sizes.

Q. Mr. Howell, cut stock and lumber is different, isn't it?

A. Cut stock is lumber processed.

Q. But I understand your answer now to be that you could have bought lumber equivalent of the amount that you wanted to fulfill this order during the periods which you claim that the defendant did not ship you?

A. We could have bought lumber. We could not have processed it.

Q. All right. Is it not a fact that Dunsmuir Lumber Company, through Mr. Rygel, on the telephone

(Testimony of Edward N. Howell, Sr.) told you that if you would acquire the lumber that he would mill it and cut it to stock at his bare cost?

A. I don't recall him saying that he would do it at his cost.

Q. Do you recall any conversation about Mr. Rygel stating that if you would acquire the lumber that he would cut it to stock?

A. I don't remember him saying that.

Q. Didn't Mr. Bennett tell you that?

A. That is in his letter.

Q. Well, did he tell you that?

A. He wrote me a letter.

Q. Now, do I understand you to testify, Mr. Howell, that [32] while lumber of the specifications under Plaintiff's Exhibit Number 1 was available at the period here in issue, that you could not get a mill anyplace to go through the simple process of ripping and sawing that into different dimensions?

A. That is right.

Q. You could not do that anywhere in the United States? A. That is right.

Q. Did you ever hear of milling in transit?

A. Yes.

Q. What is it?

A. Most of the time it is taking rough boards and planing them to size and kiln drying them.

Q. Milling in transit is where lumber in raw stage is purchased near the source of the original market and during the course of transportation east or to other destinations it is further refined or re-manufactured?

(Testimony of Edward N. Howell, Sr.)

A. It is usually done by the manufacturers themselves, not by someone selling the part.

Q. I understand, but milling in transit means that?

A. Well, I couldn't get anyone to do that.

Q. Then I understand that you could not get a concern in the United States to reduce some six or seven carloads of lumber to dimensions under this contract?

A. I didn't contact everybody in the United States. Those I contacted all refused. [33]

Q. Who did you contact?

A. Warehouser, Timber Structures, F. W. Ashley.

Q. Where is Warehouser?

A. Warehouser, sir, is a national company, a very large lumber outfit in Tacoma, Washington.

Q. Did you contact any of the concerns of Redding?

A. I don't know, I don't remember. We just took the Lumberman's Association and wrote to a lot of them who manufactured lumber, and they all refused.

Q. Did you contact any of the concerns in Siskiyou County, such as Long Bell?

A. Well, F. W. Ashley has been the Long Bell man for about ten years. I contacted him.

Q. Did you contact the McCloud Lumber Company?

A. No, I am not familiar with the lumber companies out here.

(Testimony of Edward N. Howell, Sr.)

Q. As a matter of fact, you have been out on the coast before?

A. I have been out here four times before.

Q. Were you ever out here after Plaintiff's Exhibit 1 was entered into?

A. Not at the plants.

Q. Were you ever on the Coast prior to this trip after the signing of the contract with the defendant?

A. No, I wasn't on the Coast.

Q. Did you ever have any representative on the Coast during [34] that period? A. No.

Q. All right. Are you familiar with the electric planing mill operation in Stockton within about fifty miles of this court room? A. No.

Q. Did you contact them there to get cut stock or to get random length stock?

A. I don't know any particular individual lumber company within fifty miles from the court room.

Q. And you didn't contact any, anyway?

A. No; Timber Structures in Portland is a very large outfit. They refused. Dant and Russell is one of the largest—

Q. As a matter of fact, speaking of Portland, didn't Mr. Bennett tell you in late September and early October there were two concerns in the vicinity of Portland that would have given you the cut stock that you desired?

Mr. Andersen: May I interrupt? I didn't hear the answer. Was that in letter or by telephone, Counsel?

Mr. Carlton: What was the answer, if it was answered? A. No.

(Testimony of Edward N. Howell, Sr.)

Q. Where did you buy the five cars of lumber?

A. I think my brother will have to answer that. He does all the procurement. I don't remember.

Q. Did you tell Bennett and Rygel both by telephone that you [35] had bought the cars within a hundred miles of the Dunsmuir Lumber Company plant?

A. I told him we had bought five cars, which later I found to be no good and they were all refused.

Q. Did you tell him they had proved to be no good?

A. No. We hadn't got them by that time. We were buying them for the door we were cutting, sir, not this one.

Q. When you bought them in cut stock, did you buy them in doors or lumber?

A. We bought them in lumber.

Q. Where was that to be cut?

A. That was to be processed in our own plant.

Q. And that was in late September?

A. We bought lumber all the year round.

Q. I asked you, that was in late September?

A. I don't remember whether it was late September. Along that time.

Mr. Carlton: That is all. Thank you.

Redirect Examination

Q. (By Mr. Andersen): Just a few further questions, your Honor. Counsel asked you questions about lumber that you processed yourself—

Mr. Carlton: Mr. Andersen, might I ask you to

(Testimony of Edward N. Howell, Sr.)

talk just a little louder? Your back is to me and it is hard for me to hear. [36]

Q. (By Mr. Andersen): Counsel asked you questions about lumber that you processed yourself, lumber that you buy for doors that you assemble. Would you just generally explain the operations of your mill there?

A. Well, we make about twenty sizes of doors that we carry in stock, and these two models that we bought the cut stock for are a large number of those that we sell. We reserve—by being able to purchase cut stock, it gives us the opportunity to use our own mill in the twenty other sizes that are made in less number, and that is why we bought the cut stock for models 43 and 64 which are referred to on this contract, sir, as "A" and "B" stock. If we were to cut out the stock for the "A" and "B" doors, it would cut the number of doors down that we could make in our own mill about fifty per cent.

Further, in cutting out these particular boards, they cut them from a less expensive stock than we buy. We have to buy "C" selects and better, where I understand the mills can use a lower grade and cut around knots to get these short pieces without having a long break on them. That is why we buy these small doors by cut stock.

Now, at that time we were taking cut stock from anywhere. We were in such dire need of this material that we just didn't fill our orders. That is all there was to it.

Q. During this particular time was your plant

(Testimony of Edward N. Howell, Sr.)

operating to capacity? [37] A. Yes, it was.

Q. And you were unable, then, to process this particular type of door?

A. That is right. We just suffered the loss of that many sales—that many doors.

Q. How many doors were involved in that loss of sales? A. That is around 5,000 doors.

Q. Around 5,000 doors?

A. I think 5,300 doors, something to that effect.

Q. Now, counsel interrogated you regarding the —well, let me ask you one other precise question: Why didn't you buy lumber and rip and cut it to the size of lumber—

A. We were unable to get it from anywhere that we tried. We would have taken it from anybody.

Q. And did you have plant facilities to do it?

A. To cut the stock?

Q. Yes.

A. We could not do it ourselves. We tried to buy it from other plants.

Q. In other words, what you tried to do was buy cut stock? A. That is right.

Q. Rather than lumber? A. That is right.

Q. You didn't have the plant capacity to do it yourself? A. That is right. [38]

Q. Now, also in respect to this order shown in Plaintiff's Exhibit 1 in evidence, were those orders that you had for these "A" and "B" doors to be shipped within precise times, or within general time limits, to be filled in general time limits?

A. Well, the average time is about thirty days.

(Testimony of Edward N. Howell, Sr.)

Anywhere from ten to thirty days shipment after order.

Q. You had to have this lumber within a specified time, did you? That is, this cut stock?

A. Well, in order to get it out during that year we had to have it at those times.

Q. Now, counsel interrogated you regarding Mr. Bennett. Did you have a telephone conversation with Mr. Bennett, or did you have letter correspondence with Mr. Bennett?

A. Well, with reference to this fir they were referring to they could get was in the form of a letter.

Q. That was in a letter, was it? A. Yes.

(Recess.)

Q. (By Mr. Andersen): Just before the recess I was interrogating you about a letter received from Mr. Bennett. I have shown counsel the letter, and I hand you a letter dated October—it is not dated, but it bears the receipt stamp of October 9th, 1950. Is that the letter to which you referred?

A. That is right.

Mr. Andersen: May I read it, your Honor? [39]

The Court: Very well.

Mr. Andersen: This letter is from Mr. Ted Bennett, and it is addressed to the plaintiff company. The salutation, however, being, "Dear Ed."

"You will have to forgive this pencilled note, but I just arrived and must be on my way again.

"I stopped at the mill and there just isn't any stock to finish out the car for you. As I explained to

(Testimony of Edward N. Howell, Sr.)

you over the phone, production is necessarily on pine and will probably remain so for some time.

"The only solution was to pick up lumber from other sources near the mill so that you would continue receiving the same quality and texture. I spent some time on this, and feel sure that I can work this out on the remaining few cars and possibly on the other five/ten you require."

Could I interpolate: What does five dash ten mean?

A. That they would try to get five or ten cars in addition to that contract.

Mr. Andersen (Continuing reading): "The other five/ten you require. However, the policy of the mill does not permit purchase of outside lumber for resale, except on an irrevocable letter of credit. On their own stock, of course, this [40] would be unnecessary, but purchasing outside stock, drying, surfacing, *roofing* and cutting to specific requirements. can only be handled on a L/C."

Does that refer to less than carloads?

A. I imagine that is less than carloads.

Mr. Andersen (Continuing reading): "As you know, clears have increased in price all year, consequently, in order to come out on the price will have to be increased approximately twenty per cent per set, possibly only fifteen/seventeen per cent, if the shorts could be run to 9/16 inch panel stock for you.

"This appears to be the only way to continue shipments to you at this time.

"I expect to check further on my way back to

(Testimony of Edward N. Howell, Sr.)

Portland, and expect to be back in the office next Tuesday. I will await your advice. Perhaps you should call me.

“Kindest regards, hurriedly, Ted Bennett.”

May I underscore a portion of this for the Court’s—well, that is more particularly a part of argument. I will offer this in evidence, may it please the Court.

(The document referred to was marked Plaintiff’s Exhibit Number 5.) [41]

Mr. Andersen: Q. Now, after receiving that—strike that, please. When you were questioned about receiving information from Mr. Bennett, was that the letter that you had in mind? A. Yes.

Q. And is that the only pencilled letter that you received from Mr. Bennett? A. Yes.

Mr. Andersen: That letter, your Honor, is written in longhand.

Q. Now, after that did you have another conversation with Mr. Bennett regarding lawsuits?

A. I did talk to him on the phone, and I told him I expected him to fulfill his contract and buying up his lumber at an additional price would be their problem and not mine.

Q. And did you discuss with him the necessity of you having that lumber?

A. I did, that we had no leeway—we had no way of getting it.

Q. Did you tell him you had no way of getting it, or surfacing it, or finishing it?

A. No, we couldn’t do it on account of our own capacity that we had taken up.

(Testimony of Edward N. Howell, Sr.)

Q. Now, again, shortly before the suit was filed—

Mr. Andersen: May I have the plaintiff's letter to you of October 26th? [42]

Mr. Carlton: Whose letter?

Mr. Andersen: Mr. Dorfman's letter to you of October 26th.

Mr. Carlton: Oh, the attorney?

Mr. Andersen: Yes. I will use the copy.

Q. Then before the suit was filed; to wit, on October 26, 1950, did you have your counsel in Philadelphia write to the defendant? A. Yes.

Q. Mr. Dorfman being the counsel?

A. That is right.

Mr. Andersen: I will offer this letter in evidence as Exhibit next in order.

Mr. Carlton: We object as immaterial, if the Court please.

Mr. Andersen: And I would like to read the last paragraph only.

The Court: Well, I can't determine the materiality unless I see it.

Mr. Andersen: We are only concerned with the last paragraph, your Honor.

(The document was handed to the Court.)

The Court: I think you mean the next to the last paragraph.

Mr. Andersen: Possibly so, your Honor. [43]

The Court: I think the last paragraph is pertinent.

Mr. Andersen: I didn't hear what the Court said.

The Court: I think the last paragraph is pertinent. You may—

(Document referred to was marked Plaintiff's Exhibit Number 6.)

PLAINTIFF'S EXHIBIT No. 6

Dunsmuir Lumber Co.

October 26, 1950

Dunsmuir, California

Att.: Mr. Daniel Rygel

My dear Mr. Rygel:

Please be advised that I represent The Commander Door, Inc, who advise that you refused to complete delivery of the cut stock covered by firm order of March 3, 1950, No. 2123, in that you have advised them that you will not deliver the A doors scheduled for October 1, October 15, November 1, November 15 and December 1, and the B-doors due October 15 and November 15, unless they agreed to change the terms and conditions of the orders providing for a further increase in price of 20%, as well as the posting of Letters of Credit.

As you know, this lumber was ordered from you for the purpose of manufacture into doors which have already been sold by The Commander Door, Inc. Efforts to obtain similar stock have been completely fruitless since, as you know, there is no open market for cut stock.

Unless delivery of these doors is completed in accordance with the terms of the order, it will mean that my client will not only sustain a loss of \$4.00 per set on 5,350 sets scheduled for delivery, or a total of \$21,400., but will also suffer irreparable injury so far as their business reputation is concerned.

Plaintiff's Exhibit No. 6—(Continued)

I am forwarding this matter immediately to counsel on the West Coast with instructions to institute suit during the coming week for all damages to which we shall be subjected, as a result of your unwarranted breach of contract. I trust that you will wire or call me immediately upon receipt of this letter and advise of your intention to complete delivery under the terms of the order, so that it will not be necessary to proceed with the said suit.

Thanking you for giving this matter your prompt attention, I am,

Very truly yours,

PHILIP DORFMAN

PD:LD—Air Mail

The Court: Pertinent to the extent that it contains a demand upon the plaintiff.

Mr. Andersen: Yes, sir. The last paragraph—

The Court: Next to the last paragraph.

Mr. Andersen: (Reading:) "I am forwarding this matter immediately to counsel on the West Coast with instructions to institute suit during the coming week for all damages to which we shall be subjected, as a result of your unwarranted breach of contract. I trust that you will wire or call me immediately upon receipt of this letter and advise of your intention to complete delivery under the terms of the order, so that it will not be necessary to proceed with the said suit."

(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: Q. Now, in any other conversations with Mr. Bennett, did you discuss with him the necessity and desirability of getting this cut lumber or cut stock from any source?

A. We would have accepted it from any source—— [44]

Mr. Carlton: We move to strike that as not responsive.

The Court: It may go out, it is not responsive.

Mr. Andersen: Q. The question is, did you discuss that with him?

A. What is that now?

Q. In any other conversation with Mr. Bennett, did you discuss with him the necessity of you getting this cut stock from any source?

A. Yes, we would have accepted it from any source.

Q. Generally what were your conversations with Mr. Bennett along that line?

A. All our conversations were along the line of getting these materials delivered to us because we were in dire need of them. From September to December 30th is the peak of our door building season, and it is too late to do anything else unless we have some source or it is not delivered somewhere else.

Q. Now did you have any conversations with Mr. Rygel during that time regarding—and I guess this would be telephone conversation—regarding increases in price?

A. No, I don't think that Mr. Rygel mentioned anything about increases in price.

(Testimony of Edward N. Howell, Sr.)

Q. At or about that time?

A. All that came in this letter from Mr. Bennett.

Mr. Andersen: From Mr. Bennett. That is all [45]

Recross Examination

Mr. Carlton: Q. Mr. Howell, in connection with receiving a letter from Mr. Bennett in which he said that the market was up on lumber, do you recall that Bennett told you over the telephone that he could acquire either in lumber form or cut stock form this order for you, the unfilled portion for you, in Portland or in that vicinity?

A. No, indeed, he did not. We would have taken it.

Q. And do you recall Mr. Bennett told you over the phone, as well as writing you, that he told you if you insisted on Dunsmuir Lumber Company cutting it that the fir market was up in that region and the lumber would cost you more?

A. If he said that in a letter, it is in there.

Q. Regardless of a letter, didn't he tell you that in a conversation?

A. That we would have to pay more for the cut stock?

Q. No. Did you not tell Bennett that you insisted on Dunsmuir Lumber Company cutting that stock, that you weren't going to get it that way?

A. No. We insisted on them cutting that stock, I didn't say we wouldn't take it.

Q. Didn't Bennett tell you in that telephone conversation that fir was up in the Dunsmuir region and it would cost more there, but it could be acquired

(Testimony of Edward N. Howell, Sr.)
at comparable prices to the contract in the immediate
vicinity of Portland, including [46] Washington?

A. No. There would be no reason for me to not
take it. We wanted lumber. That is all we wanted was
cut stock.

Q. I want to ask you just preliminarily another
question: Did you not tell Rygel in your conversation
with him—

Mr. Andersen: Could I have the date?

Mr. Carlton: Yes. In late September or early Oc-
tober of 1950, did you not tell Rygel that you had just
gotten five cars of lumber of the types involved here
at a better price and just as good quality?

A. No, I didn't.

Q. You told him you had gotten five cars of lum-
ber?

A. Told him we had purchased five cars of lum-
ber not too far from him.

Q. And didn't Rygel then tell you why not get it
yourself and send it to him and he would mill it at
cost?

A. No, I didn't, I took no part in buying lumber
for his contract.

Q. Now, Rygel told you he couldn't fulfill the rest
of the order, that he didn't have the lumber?

A. He said he wasn't going to fulfill the rest of it.

Q. He told you he wasn't going to fulfill the rest
of the order? A. That is what he said.

Q. That is what he told you over the telephone?

A. That is right, that he had been a lawyer for
thirty years [47] and he could get out.

(Testimony of Edward N. Howell, Sr.)

Q. And he told you he wasn't going to fulfill it?

A. That is right.

Q. And didn't you tell Rygel that you had investigated and found out he was a responsible concern and you were going to make him ship that lumber or he was going to have a lawsuit?

A. I don't recall saying those words at all.

Q. Now I understood your former testimony to be that the reason you could not accept lumber as distinguished from cut stock and rip it up back at Pennsylvania was because you had other functions for your plant to perform in cutting, is that right?

A. I said we were running to capacity on these machines that would do that work.

Q. Now you told us that you purchased five cars of lumber of this quality—

A. I didn't say this quality, I beg your pardon.

Q. Well, in lengths of this general type?

A. I said we purchased five cars of lumber which we did not accept.

Q. But for delivery back at Pennsylvania, to your plant at Pennsylvania? A. That is right.

Q. And it was to be ripped and sawed back there?

A. For doors, for other models, not that model.

Q. And it proved that that lumber was unacceptable to you and you rejected it, didn't you?

A. That is right.

Q. Then why could you not have accepted the lumber to fulfill this contract and use those machines, since you had repudiated those five cars?

Mr. Andersen: I object to that as argumentative.

(Testimony of Edward N. Howell, Sr.)

The Court: Overruled.

A. We only manufacture one quality door and one quality material.

Mr. Andersen: May I have that go out, please, for the purpose of the objection?

The Court: The objection is overruled.

Mr. Carlton: What was the answer? I didn't hear it.

A. We don't accept inferior lumber for one door and better lumber for another.

Mr. Carlton: Q. I know, but you had five cars of lumber back there that you had accepted—

A. We didn't have five cars. They shipped one car and we refused that and cancelled the other five cars, so we never had those five cars.

Q. Your contention is here there was six to seven cars to come out of this order that was unfilled, is that correct?

A. That is right, but each car of cut stock, let me inform you, is equivalent to about two cars of lumber. [49]

* * * * *

MOTION FOR DISMISSAL

Mr. Carlton: Pursuant to Rule 41(b) of the rules of civil procedure, we move for a dismissal of this action under the facts developed by the plaintiff in this case, that no cause of action or case is stated, predicated upon the provisions of the document entitled Plaintiff's Exhibit 1, which in two places has this statement: "It is understood and agreed that any

unshipped portion of this contract may be cancelled at any time without cost to us."

The Court: What have you got to say to that, Mr. Andersen? The testimony of your last witness was to the effect that Mr. Rygel—is that his name—Rygel told him in September or October that he wasn't going to fill the order.

Mr. Andersen: Well, in the first place I don't think that this was very important; after discussing that with the Court I may ask leave to reopen the case for just a moment for a little piece of evidence that will take care of that. But as I read this, I think it falls under the general rule that a matter which is printed in a contract is superceded by written matter, is one answer to it.

The Court: There is no conflict between the two here.

Mr. Andersen: I beg your pardon? [68]

The Court: There is no conflict between the two here.

Mr. Andersen: This is a contract—

The Court: There is no conflict between the printed part and the typewritten part.

Mr. Andersen: We don't say there is necessarily a conflict, but on the second page your Honor will observe under the word "terms", forgetting the discount, it says, "The prices on this order are firm. Quantity of cars can be increased or decreased as required in cooperation with the manufacturer."

The printed section here, we look at in two ways: First, that it is simply a provision reserved for The Commander Door Company, reserved by them, The

Commander Door Company, and, secondly, that it would read—the printed portion is read out of the contract by virtue of the fact that the language on the second page refers to an absolute firm commitment, which would be inconsistent with the cancellation of the contract.

The Court: It says, "Prices are firm."

Mr. Andersen: Yes, "the prices on this order are firm."

The Court: There is no ambiguity. You can read that and say the contract can be terminated or cancelled, but that the prices are firm until it is cancelled.

Mr. Andersen: And then we have the third line there referring to a decrease or increase with respect to the order as a whole, in cooperation with the manufacturer. We look at that both ways, your Honor: First, that the printed language, [69] "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us," any part of the contract at all as finally signed, was simply for the benefit of the Commander Door Company, as one basis, and, secondly, that the language that I read from the second page reads the printed matter out. If there is any question about it, we would like to reopen the case to show this, may it please the Court: That this is the second order placed with the company; the first order for identically the same material was not firm—these people use the word "firm". So when we sent the first order they turned it down on the basis that it was not what they call a firm order, and then we had a letter from them in which they say, "We are not going to engage in

business with you if things can be cancelled if prices go up and down."

Then, pursuant to that letter, which we have, this letter was sent. In other words, this order here involves one previous order, plus one previous letter, all of which have to be read together.

The Court: But, Mr. Andersen, the difficulty is this, the "firm" relates to prices.

Mr. Andersen: And also the quantities.

The Court: No.

Mr. Andersen: Can we introduce the letter—

The Court: You can't vary a contract by some parol understanding.

Mr. Andersen: That is correct. [70]

The Court: The only thing is, does this provision apply both ways?

Mr. Andersen: I think with the other two documents the Court can see—

The Court: How can you get the other two documents in, if they would vary the terms of this express order?

Mr. Andersen: They would not, your Honor, they would simply be explanatory of it.

The Court: I don't see any occasion for anything explanatory. It seems to me if you attempt to interpret this word "firm" as applying to quantity as well as to price, you are varying the express terms of this order, because the word "firm" applies to price and not quantity.

(Further argument.)

The Court: Well, I am disposed to agree with you,

Mr. Carlton, on your position. However, I want Mr. Andersen afforded an opportunity to look up any law that he believes will sustain his position, and also I am going to reopen the case to permit him to make his offer of additional testimony. One-thirty.

(Thereupon an adjournment was taken until 1:30 o'clock P.M. this date.)

Monday, April 23, 1951—1:30 O'Clock P.M.

Afternoon Session

The Clerk: Number 6410, Commander Door, Inc., vs. Dunsmuir Lumber Company.

Mr. Andersen: On the reopening, may it please the Court, we have entered into one or two stipulations—

The Court: I think you can just make your offer now without calling the witness. State what you expect to prove by whoever you do recall.

Mr. Andersen: We will prove that Mr. T. D. Bennett, whose name has been mentioned here, during all the times mentioned was a representative of the defendant company; secondly, that the final shipment under the order was made September 18th of 1950, and that is important in the light of certain correspondence which was written after the signing of the order of March 3rd, which is Plaintiff's Exhibit Number 1.

I will offer in evidence, then, a letter by Mr. Bennett dated February 10th which precedes the order, may it please the Court.

The Court: Those should be marked for identification.

Mr. Andersen: Then I will offer the letter of September 30 as Plaintiff's Exhibit next in order.

The Clerk: For identification?

Mr. Andersen: For identification. [72]

The Court: For identification.

(Letter from T. D. Bennett to Ed Howell, Commander Door Company, Inc., dated September 30, 1949 was marked Plaintiff's Exhibit Number 8 for identification.)

PLAINTIFF'S EXHIBIT No. 8

[For Identification]

[T. D. Bennett Letterhead]

Mr. Ed Howell
Commander Door Co., Inc.
48 Howell Avenue
Holmes, Pennsylvania

Sept. 30, 1949

Dear Mr. Howell:

I have been supplying several overhead door manufacturers and industrials, and would appreciate an opportunity to quote on your requirements.

In this connection, I directly represent the Rygel Fir Manufacturing Co. of Dunsmuir, Calif., and am specializing in industrial cut stock for them. Rygel is a large modern plant with the latest type machinery and dry kilns, and equipped to manufacture any wood product from glued-up core stock to lumber in both Fir and Pine.

Rygel overhead door stock is produced from fine old growth close grained soft textured Fir. It is remarkably easy to work—there is no loss in manufacturing. Your requirements are shipped in S2S

Plaintiff's Exhibit No. 8—(Continued)
blanks cut to exact size. Freight is saved because
there is no waste on your end. Each piece is No. 1
cut stock.

I have seen some of the lumber shipped as over-
head door stock, and can understand many of your
problems. Not even an inspection certificate will pro-
tect the buyer from hard texture and checks—you
must rely on the mill.

All orders would be placed with the mill, con-
firmed by the mill, and the mill would invoice you
direct.

I shall look forward to hearing from you, Mr.
Howell, as I am confident that you will be more than
satisfied with the stock, the mill and the manner in
which this business is conducted.

Cordially yours,

/s/ TED BENNETT

TDB:b—cc/Rygel

Note: Should you desire personal references, do
not hesitate to contact the following:

Mr. Austin Minnich, Austin Supply Co., Phila-
delphia, Penna.

Messrs. William (or) Herman Meyle, Independent
Pier Co., Phila.

Mr. Watson Malone, Watson Malone & Sons,
Phila.

Messrs. Parke Bentley (or) Wm. Young of Wm.
M. Young Co., Chester, Penna.

Mr. Robert Kelly, Attorney, Packard Bldg., Phila.

Mr. Carlson: What is the date of that?

The Clerk: That is September 30, 1949.

Mr. Andersen: The next letter that I would offer in evidence, and offer it for identification, is the letter of February 10th by Mr. Bennett to the plaintiff in which—that letter in your Honor's hand is only important to show that Mr. Bennett represents the defendant.

The next letter I would offer in evidence and offer for identification is a letter dated February 10th from Mr. Bennett to the Plaintiff company, and from which I will read the relevant portion to the Court, rather than have the Court read the entire letter, and that is the second paragraph:

“In your letter”—which refers to a letter of January 24th—“you mentioned ordering your requirements starting the middle of March. However, Rygel Fir must set up their factory schedule against firm orders now. Should you want to schedule only two cars per month to start while you use up some of your inventory, I feel sure it would be all right with Mr. Rygel.”

Then at the bottom of the letter in handwriting is a paragraph, “Rygel can commit all his production for the entire [73] year right now, but will wait until I hear from you.”

(Letter from T. D. Bennett to Edward N. Howell, dated February 10, 1950, was marked Plaintiff's Exhibit Number 9 for identification.)

8

T. D. BENNETT
LUMBER

Domestic - Export
Commission - Representation

9.06 675-
906 906

Less 37-
10 day
aft Deliv. for

Sherlock Building
Portland 4, Oregon

February 10, 1950

Capitol 5858

1-15 2 Cars April
2 Cars May
2 Cars June
2 Cars July

Mr. Edward N. Howell
THE COMMANDER DOOR, INC.
Holmes, Pennsylvania

Dear Mr. Howell:

I appreciated your letter of January 24th with reference to scheduling a large part of your cut stock requirements with Rygel Fir. Mr. Rygel advised me by telephone this morning that his factory will resume operation March first. Consequently, we must have your orders on hand by return air mail in order to fit your requirements in with the factory production schedule. Rygel Fir can ship you one car per week throughout the year. Should you require occasional cars such as requested in yesterday's wire to me and to Rygel, same could be shipped after the plant resumes operation.

In your letter you mentioned ordering your requirements starting the middle of March. However, Rygel Fir must set up their factory schedule against firm orders now. Should you want to schedule only two cars per month to start while you use up some of your inventory, I feel sure it will be all right with Mr. Rygel.

Your reply by return air mail is required in order for this production to be held for you.

Kindest regards.

Cordially yours,



T. D. Bennett

TDB:mw

cc: Rygel Fir Manufacturing Co.

I gel can commit all his
duction for the entire year
t now but will wait until I
from you. So give this note
in prompt attention.

Mr. Rygel: I could not do any thing on your wire
because the door (house) plants are paying up
to 200/4 for the same stock. I can get sticks to
exact length but at 260/4. Rygel called me when
he received your wire direct but they are not yet
in production. He will be our best bet. 300/4
He will offer C 150. KD 325 at 175.00 3045.00
11/11

$$\begin{array}{r} \overline{52} \\ \overline{-48} \\ \hline 4 \end{array}$$

$1\frac{9}{16}$ $8\frac{1}{4} \times 6' \times 8''$ \$28 to $1\frac{2}{3}$
 Mi. wood. per ft. fill in
 net 57 car cut stock
 $1\frac{2}{3}$ stock. to make the car
 shp. to be made with
 per m 1915 Jm Hahn

$1\frac{1}{8}$ cars cut stock \$15 to 9.06
 $1\frac{1}{3}$ cut stock "A"

6 car cut stock B $6\frac{7}{8}$

To Li Oan, gen $7\frac{1}{2}$ ⁴⁰⁰
 Term. 3%, 10 days after date
 and less $\frac{1}{2}$ st.

Mr. Andersen: I next offer in evidence a letter of February 23rd of 1950, which I now offer for identification, a letter by Mr. Bennett to the Plaintiff Company. I will just read the relevant portions of it, if the Court please.

The Court: All right.

Mr. Andersen: "It was also my impression that you wanted a fixed price for the entire year so as to accurately set your door prices and feel sure in accepting future business."

And then again, "The industry expects a very good year and prices are very firm for the next five months. Consequently, there are lots of contract orders available. Rygel knows that two other concerns have asked me to set up a contract for his stock, but I told you that I would work with you, and, therefore, your requirements come first."

(The document referred to was marked Plaintiff's Exhibit Number 10 for identification.)

PLAINTIFF'S EXHIBIT No. 10

[T. D. Bennett Letterhead]

Mr. Edward N. Howell
Commander Door, Inc.
Holmes, Pennsylvania

Feb. 23, 1950

Dear Mr. Howell:

I have today received a copy of Mr. Rygel's letter of the 20th to you. I tried to contact you by telephone but understand that you would be out of town until Monday.

When you telephoned me (February 15) you stated

Plaintiff's Exhibit No. 10—(Continued)
that you would like to get the smaller of the two sets shipped from Dunsmuir at \$6.75 and that you had been paying approximately \$7.35/7.45. You did not have the list of sizes in front of you but did refer to a model 64 and 43 and advised that only two different sets had been received and that it was the smaller set. I in turn passed this information on to Mr. Rygel.

It is very regrettable that this mix-up occurred but feel sure you will find that the price of \$7.15 for the set as listed is very fair. Equalizing charges were noted in my letter of February 13th.

It was also my impression that you wanted a fixed price for the entire year so as to accurately set your door prices and feel sure in accepting future business.

Your prompt reply to Mr. Rygel covering these pertinent points will be appreciated.

Kindest regards.

Cordially,

/s/ TED BENNETT

TDB:mw—cc:Rygel

Note: We could have caught this if you had given me the amount of pieces in this set. However, Rygel did give a very fair price at \$7.15 as you will find upon checking end lumber costs. Be sure you give his letter your prompt attention—possibly call him. The industry expects a very good year and prices are very firm for the next five months. Consequently, there are lots of contract orders available. Rygel

Plaintiff's Exhibit No. 10—(Continued)

knows that two other concerns have asked me to set up a contract for his stock but I told you that I would work with you, and therefore your requirements come first.

T.D.B.

[In longhand]: I am looking forward to your visit at which time we can go over your program. Had a chance to pick up a car of MG B&Btr 6/4 KD S2S at \$145/mill today but you could not be reached. It sold at \$165.

Mr. Andersen: I next offer in evidence and submit it for identification next in order a letter by the Plaintiff Corporation—pardon me, a letter by the Plaintiff Corporation to Mr. Bennett, which replies to a letter of Mr. Bennett of the [74] 21st, the contents of which are not particularly relevant here, the first paragraph of which reads, "This will acknowledge"—this letter is dated July 25, 1950.

"This will acknowledge receipt of your letter of the 21st"—which is the 21st of July, which is after the order—"and to advise that our order with you and Dunsmuir Lumber company was a firm order and was not placed with you with the understanding that the prices were to be made at time of shipment."

I will mark the paragraph for the Court's convenience.

(Copy of letter from Commander Door, Inc. to T. D. Bennett, dated July 25, 1950, was marked Plaintiff's Exhibit Number 11 for identification.)

PLAINTIFF'S EXHIBIT No. 11

Mr. T. D. Bennett
T. D. Bennett Lumber Co.
Sherlock Building
Portland 4, Oregon

July 25, 1950

Dear Ted:

This will acknowledge receipt of your letter of the 21st and to advise that our order with you and Dunsmuir Lumber Company was a firm order and was not placed with you with the understanding that the prices were to be made at time of shipment.

I have just talked to Mr. Rygel and he advises that he refuses to make further shipments unless we accept a 7% increase on the stock he is furnishing. Inasmuch as we are committed to manufacture and deliver Commander Doors to our dealers based on the price of our firm order to you, we have no alternative but to say "go ahead". It is my understanding after talking with Mr. Rygel that he will proceed and make shipment in accordance with the schedule with doors he is to manufacture for us.

In the last car MEC 4782, there were 9,000 pieces which should have been $3\frac{1}{2}$ " wide x $19\frac{1}{4}$ " long. These pieces arrived $3\frac{1}{2}$ " to $3\frac{5}{8}$ " wide at one end tapering to $3\frac{1}{8}$ " and $3\frac{1}{4}$ " at the other end which makes it impossible to use any of these 9,000 pieces for the $3\frac{1}{2}$ dimension stock. Talking to Mr. Rygel this morning, he advised us to rip these pieces to $2\frac{1}{2}$ " wide and on his next car he would send us 9,000 additional pieces of $3\frac{1}{2}$ " wide stock and would short us 9,000 pieces $2\frac{1}{2}$ " wide which would equalize the two cars.

Plaintiff's Exhibit No. 11—(Continued)

We will of course keep the time cost on ripping these 9,000 pieces and will keep it as low as possible as we realize it was an error in the shop and certainly no fault of Mr. Rygel's. When I talked to him he was very nice about the entire matter and we feel very happy that we have the association with him and yourself.

With best personal regards.

Very truly yours,

THE COMMANDER DOOR, INC.

EDWARD N. HOWELL

h/t—cc: Dunsmuir Lumber Company.

Mr. Andersen: I next offer in evidence the original contract dated, and submit it—you have seen this (exhibiting to Mr. Carlton) ?

Counsel has read all these letters. I had assumed that he had read the original contract.

I next offer in evidence and submit it for marking for identification a purchase order form which is typed on the same form as Plaintiff's Exhibit Number 1, the main contract in evidence—there are certain pencilled notations on it, I offer it without the pencilled notations, as simply being the original contract submitted to Mr. Rygel, and will offer [75] just the printing and typing on the contract without the pencilled notations which bear no relevance to the matter.

(The document referred to was marked Plaintiff's Exhibit Number 12 for identification.)

REMARKS *Per L. C. L.*

REBATE ORDER

THE COMMANDER DOOR, INC.

1000 BROADWAY, NEW YORK, N.Y.

1000 BROADWAY, NEW YORK, N.Y.

1000 BROADWAY, NEW YORK, N.Y.

CHARLES A. KINSELL, PRES.

PAGE TWO

DET. FEBRUARY 11, 1917

NO. 2107

General Lumber Company

Baltimore, California

ONE HUNDRED PER CENT
REFUND ON ALL MATERIAL
SHIPPED ON THIS ORDER

EXCLUS. PA

PLEASE SHIP THE FOLLOWING

ITEM NO. 2000

DET. FEB. 11, 1917

Car stock "A" each car consisting of the following

7500 Pcs.	4-7/8"	x 31-4"
7500 "	5 1/2"	x 31-4"
4500 "	2 1/2"	x 31-4"
2500 "	2 1/2"	x 22-1/2"
4000 "	5 1/2"	x 22-1/2"

57.6 per set
delivered per car.
Baltimore, Maryland

Car stock "B" each car consisting of the following

3000 Pcs.	4-7/8" x 31-4"
3000 "	5 1/2" x 31-4"
5200 "	2 1/2" x 31-4"
1200 "	2 1/2" x 25 1/2"
4500 "	4 1/2" x 25 1/2"

7200
~~4500~~ per set
delivered per car.
Baltimore, Maryland

The above materials are to be no growth Douglas Fir KD or
11-12% moisture content, with 40% minimum section grain or
S-4 Better grain, clear, no pitch pockets, knots, etc. Dressed
over sides to 1-1/2" thickness.

The 4" lengths are to be exact precision cut square ends, the
2 1/2" and 2 1/2" lengths may be cut to 1/4" but not less than 2 1/4"
and 2 1/2" all pieces to be straight and a radius that can be
inscribed by the

72 11

The Commander Door

THE COMMANDER DOOR, INC.

John C. L.
President of THE COMMANDER DOOR, INC.

Box Copy must be signed and initialed in
order to have prompt delivery of necessary goods.

dated by

Copy to: *John C. L.*, Manager Freight, Central, B & O.

I think that should read, "The prices quoted are firm," to make sense out of it.

"However, with general market conditions are lower, prices are to be adjusted."

That probably means, to paraphrase it, that market conditions may be adjusted. That is what is stated on Exhibit 12, may it please the Court.

"This is not my agreement with you, if you desire to discuss prices every sixty or ninety days, I am willing to discuss the prices, but I will not stand firm on an up market and reduce on a down market, so that paragraph will have to be changed, either by having the following, 'The price is quoted firm for the year,' or, 'Prices to be based upon general market conditions every sixty or ninety days' as decided upon."

And the next paragraph: [77]

"I should be pleased to enter into the contract with you, based upon the above conditions, but I cannot under any circumstances cut Style "B" fifty per cent less than Style "A", because there is only five feet less than Style "A", which means, there being 41.59 feet in Style "A", five feet would be $\frac{1}{8}$ or $12\frac{1}{2}$ per cent less, in lumber only the cost of lumber in manufacturing Style "A" and "B" are exactly the same, there are the same number of different sized lengths and widths, the only difference is five feet more than Style "B". I trust that you will understand this fully, and do not think that I am hedging, but I assure you at the time that I figured the price of Style "B" it was based upon the amount of 26 feet per set, and not 35.98 feet per set. Kindly

advise me at once as to your wish in the matter as I wish to make my commitments for the year, and if you find that you cannot handle the same, and wish to cancel the entire order, you may use your judgment, as I find that there are half a dozen different firms who are most anxious for me to manufacture for them, but I have been pleased with the association of your company and would be pleased to continue the same for the coming year. Please advise me at once as [78] to your pleasure. I also note,"—

Well, the rest is not important to the question.

(Letter from Dunsmuir Lumber Company to Commander Door, Inc., dated February 20, 1950, was marked Plaintiff's Exhibit Number 13 for identification.)

PLAINTIFF'S EXHIBIT No. 13

[Dunsmuir Lumber Co. Letterhead]

[Pencilled figures in margin]:			\$7.37	\$7.00
46.49	A	9.67	9.66	
35.20	B	.60	.60	
<hr/>			<hr/>	<hr/>
11.29	Differ	9.05	.60	

Commander Door, Inc. Feb. 20, 1950
Holmes, Pa.

Att.: R. A. Howell

My dear Mr. Howell:

I have this date received your letter of February 17th containing order No. 2107 for the cut stock, sixteen cars A and six cars B. In going over your

Plaintiff's Exhibit No. 13—(Continued)

B Style I find that when I made the price to you of \$6.75 per set delivered I had in mind a specification from the American which was as follows:

1 Piece 1-13/32 x 37/8 x 96"	
1 Piece 1-13/32 x 53/8 x 96"	2.60 M
6 Piece 1-13/32 x 25/8 x 96"	

This set amounts to 26 ft., and I quoted the price of \$6.75 for that set, now, I notice that your Style B consists of:

1 Piece 1-13/32 x 47/8 x 8'	
1 Piece 1-13/32 x 31/2 x 8'	
4 Piece 1-13/32 x 21/2 x 8'	
9 Piece 1-13/32 x 31/2 x 251/2"	2.17 M
6 Piece 1-13/32 x 21/2 x 251/2"	

This makes a total of 35.98 ft., this compares with Style A of 41.59 ft., in other words, there is less than 6 ft. difference between the A and the B, my price on the A was \$9.65 per set delivered plus equalizing charge of \$7.30 per thousand pieces, now then, in respect to Style B, the very closest price that I can

[In pencil]: 7.00

figure on Style B would be \$7.15 per set delivered plus equalizing charge of \$7.30 per thousand pieces, and if you do not desire the equalizing of the 8 ft. lengths then that would be omitted, however, \$7.15 is the very best price that I can make on the B Style, and if this does not meet with your approval then I suggest you cancel that. In respect to Style A, you have requested in the past of having this equalized,

Plaintiff's Exhibit No. 13—(Continued)

my price was, as I said, \$9.65 for that set plus the equalizing charge, my new price for that set to you is \$9.06 per set delivered plus the equalizing charge, I do not make any money on this equalizing charge as it is labor, and if you do not wish it equalized then the set will be \$9.06 per set delivered.

[Printer's note: The balance of Plaintiff's Exhibit No. 13 was read into the record.]

Mr. Andersen: I offer—I have taken the liberty on all these letters to put a little mark on the margin to direct the Court's attention to the matters I think important. Of course, there may be other matters in there of importance, too, but I don't believe there are.

And then the letter written by Mr. Bennett to the plaintiff company, which I will offer for identification as Plaintiff's Exhibit Number 14, in which they refer to exhibit number—the one on that yellow letter—

The Clerk: That is Number 11.

Mr. Andersen: What date, July 25?

The Clerk: Yes.

Mr. Andersen: In which Mr. Bennett refers to Plaintiff's Exhibit for identification Number 11, in which Mr. Bennett, speaking for the lumber company says, quote, "With reference to this being a firm order. My discussions with the mill and subsequent representations to you were to that effect."

(Letter from T. D. Bennett to Edward N. Howell, dated July 27, 1950 was marked Plaintiff's Exhibit No. 14, for identification.) [79]

PLAINTIFF'S EXHIBIT No. 14
[T. D. Bennett letterhead]

Mr. Edward N. Howell
The Commander Door, Inc.
Holmes, Pennsylvania

July 27, 1950

Dear Ed:

I am in receipt of your letter of the 25th. Mr. Rygel telephoned me that you were in communication with him and that the mill will proceed with your shipments.

With reference to this being a firm order. My discussions with the mill and subsequent representations to you were to that effect. However, your initial order of February 17th stated: "The price quoted is firm. However, when general market conditions are lower, prices are to be adjusted." This order was not acceptable and was returned. I do not have a copy of the present order in my office.

As stated in our telephone conversation, normal increases were to have been absorbed and the mill has done so. However, not only labor insisted upon a larger than average increase but everything else including the Forest Service increasing timber under contract necessitated this request for an increase. As previously pointed out, the mill absorbed this loss as long as possible but it finally resolved itself to either getting an increase or shutting that plant down. You cannot continue to operate at a loss. Frankly, all Mr. Rygel expects the plant to do is break even on your orders.

Your co-operation and understanding in this respect was necessary and appreciation will be evi-

Plaintiff's Exhibit No. 14—(Continued)
denced by prompt shipments and any other service
which can be rendered.

The narrow shorts contained in MEC 4782 are a surprise to me because all stock is ripped and cut to size by the same operators as in the past. However, there has been a recent change in supervision which may account for same. I cannot understand how all can be narrow, so please check each piece before ripping to 2 $\frac{1}{2}$ ".

I am still expecting you next week. Please let me know what day that will be.

Kindest personal regards.

Cordially,

/s/ TED BENNETT

TDB:mw—cc.: Dunsmuir Lumber Co.

[In longhand]: I have an idea on your house doors
and will cover same during your visit—B.

Mr. Andersen: I also wish to prove on this offer of proof, may it please the Court, that in all conversations held between my client and the defendant company, that all discussions were had in the light of this contract being a non-cancellable contract as to any quantities to be shipped.

I also would prove through the testimony of Mr. Rygel that the order would not have been accepted had it not been a firm order, requiring all of the order or cut in stock, as it is called, on the order to be shipped.

Now, just by way of a brief argument—

The Court: Well, before you go into any kind of argument:

Now, this offer has been made. Your objection?

Mr. Carlton: Yes. The objection is, it is incompetent, irrelevant, and immaterial, not within the issues, seeking to vary the terms by parol of an instrument in writing, with a clear instrument in writing stating in two places as to the right of cancellation, and none of the writings can dispute or otherwise affect the final memorial contract which was stipulated between the parties here was the contract.

The Court: The objection is sustained.

Mr. Andersen: May I argue it briefly?

The Court: Yes.

(Argument.)

The Court: Well, as I view it, when the Court has presented to it a question of interpretation of a contract, [80] the first question the Court must answer is, Is there any uncertainty or ambiguity in this contract? If there is not, the parol evidence rule precludes us from considering any negotiations, written or oral, which preceded the entering into of the formal contract.

The Court cannot make contracts for people. They make them for themselves.

Now if it does not express the intent and purpose of the parties and it is not ambiguous, then the remedy is by reformation, if equitable grounds for reformation be present; but if, as I view it here, you have a contract that is not ambiguous—the two provisions you mention to me are readily reconcilable, the order was firm as to price, with the printing very clearly providing that it cannot be cancelled as to any unfilled part of the order, so I see nothing ambiguous in

the contract, and if there is no ambiguity the parol evidence rule precludes me from receiving any evidence which would have a tendency to vary the terms of that agreement.

Now, I understand you rest?

Mr. Andersen: As to the first cause of action.

The Court: As to the first cause of action?

Mr. Andersen: Yes.

The Court: And you renew your motion?

Mr. Carlton: I renew my motion.

The Court: I am constrained to dismiss your first cause [81] of action, and that is the order.

Mr. Andersen: All right, your Honor. Would you take the stand?

The Court: The second cause relates to—

Mr. Andersen: Just the freight refund, your Honor. It only involves \$300.00 odd dollars.

* * * * *

[Endorsed]: Filed August 23, 1951.

[Endorsed]: No. 13074. United States Court of Appeals for the Ninth Circuit. The Commander Door, Inc., a corporation, Appellant, vs. Dunsmuir Lumber Co., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed August 23, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13074

THE COMMANDER DOOR, INC., a corporation,
Plaintiff and Appellant,

vs.

DUNSMUIR LUMBER CO., a corporation,
Defendant and Appellee.STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant intends to rely upon the following points upon the appeal herein:

1. That the trial court erred in entering judgment for defendant.
2. That the trial court erred in holding that the contract (Exhibit 1) barred a recovery by plaintiff.
3. That the trial court erred in refusing plaintiff's offer of proof, the offer of proof being directed to show that the printed words on Exhibit 1, "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us," were in fact not a part of the contract and had, by the agreement of plaintiff and defendant, been rendered valueless, of no meaning, and no part of the contract.
4. That the trial court erred in holding that the language quoted in specification 3 could not be ex-

plained, and thereby rendered meaningless by the previous and subsequent acts and declarations of the parties.

GLADSTEIN, ANDERSEN &
LEONARD,
/s/ By GEORGE R. ANDERSEN,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 17, 1951. Paul P. O'Brien,
Clerk.

